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In The
Supreme Court Of The United States

OCTOBER TERM, 1982

KARL FLEISCHMANN, TRUSTEE
Appellant

v.

WETHERSFIELD PLANNING AND ZONING COMMISSION ET AL
Appellees

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

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MOTION PRESENTED

THE APPELLEE WETHERSFIELD PLANNING AND ZONING COMMISSION'S MOTION TO DISMISS OR AFFIRM

The United States Supreme Court should dismiss the appellant's appeal under 28 U.S.C. §1257(2) and its writ of certiorari under 28 U.S.C. §1257(3) or affirm the Connecticut Appellate Session's decision because these federal statutory provisions are not applicable to this case and therefore, cannot confer jurisdiction to this Court. Alternatively, this Court should dismiss the appellant's appeal and writ or affirm the Appellate Session's decision because the Appellate Session's decision rests upon an adequate, non-federal basis and because the appellant has failed to present a substantial federal question to this Court.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, 14th Amendment, Due Process Clause

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. §1257(2) and (3)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of . . . a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. . . .

Supreme Court Rule 16(b)

> The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

§8-28 Conn. Gen. Stats.

Notice of all official actions or decisions, not limited to those relating to the approval or denial of subdivision plans, of a planning commission shall be published in a newspaper having a substantial circulation in the municipality within fifteen days after such action or decision. Except as provided in Section 8-30, any person aggrieved by an official action or decision, including a decision to take no action, of a planning commission, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of a planning commission, may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published, to the superior court for the judicial district within which the municipality with such planning commission lies. . . .

STATEMENT OF THE CASE

On December 15, 1981, the appellee, the Wethersfield Planning and Zoning Commission ("the Commission") approved a change of zone application filed by the Jordan Lane Associates. On December 18, 1981, notice of said decision was published in the New Britain Herald, a newspaper of substantial circulation in the Town of Wethersfield.

The appellant owns property abutting the land owned by the Jordan Lane Associates. On September 15, 1981, the appellant appeared and testified at the Commission hearing regarding the zone change request. On January 14, 1982, well without the statutorily provided appeal period, the appellant served his appeal of the Commission's approval of the application.

In a Memorandum of Decision dated April 16, 1982, the Superior Court, Dupont, J., pursuant to the appellee's motion, dismissed the appellant's appeal as being untimely filed.

The appellant took an appeal to the Appellate Session of the Superior Court and submitted only one issue. That issue was:

> Is notice by publication of a municipal board's decision sufficient under the due process clauses of both the United States and the Connecticut Constitutions as to a party to the proceedings who has requested that he be directly advised of the outcome?

In its Memorandum of Decision, on December 24, 1982, in a per curiam decision, a panel of the Appellate Session of the Superior Court affirmed the trial court's dismissal of the appellant's appeal. The court interpreted the appellant's issue as follows, "The plaintiff does not

claim that the Statute (§8-28 Conn. Gen. Stat.), in authorizing notice by publication, is constitutionally defective on its face . . . Rather, the plaintiff contends that due process mandates personal notice in his case because of his specific request for notification." *Fleischmann v. Planning and Zoning Commission*, 38 Conn. Sup. 590, 591 (1983). The Appellate Session struck down the appellant's argument because, "There is no constitutional right to judicial review of the action of a planning or zoning agency. Such review exists only under statutory authority." *Schwartz v. Town Plan & Zoning Commission*, 168 Conn. 20, 24-25, 357 A.2d 495 (1975). The Appellate Session sustained the trial court's dismissal on the basis of the appellant's non-compliance with the state statute of limitations, §8-28 Conn. Gen. Stats.

On January 5, 1983, the appellant filed a petition with the Connecticut Supreme Court seeking certification for review of the Appellate Session's decision. The appellant presented only one issue, "Whether notice by publication meets due process minima as to a party to zoning board proceedings who has requested notice in writing." On January 26, 1983, the Connecticut Supreme Court issued its Order Denying Certification without comment.

ARGUMENTS IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

I. The United States Supreme Court does not have jurisdiction under 28 U.S.C. §1257(2) or (3) because the appellant never questioned the validity of Section 8-28 Conn. Gen. Stats. in the Appellate Session of the Connecticut Superior Court.

28 U.S.C. §1257(2) and (3) state:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States. . . .
>
> 28 U.S.C. §1257(2) and (3).

The appellant never, in the lower courts, raised the issue of the constitutional validity of Section 8-28 of the Connecticut General Statutes. This was the only state statute involved in the case. Thus, the Connecticut Appellate Session of the Superior Court never ruled on the issue.

The Appellate Session was the highest court of the state in which a decision could be had in this case because the Connecticut Supreme Court denied certiorari. *Cohen v.*

California, 403 U.S. 15 (1970), reh. den. 404 U.S. 876 (1971); *American R. Express Co. v. Levee*, 263 U.S. 19 (1923); *Bacon v. Texas*, 163 U.S. 207 (1895).

The appellant presented only one issue to the Appellate Session: "Is notice by publication of a municipal board's decision sufficient under the due process clauses of both the United States and the Connecticut Constitutions as to a party to the proceedings who has requested that he be directly advised of the outcome?" Appellant's July 15, 1982 brief to the Appellate Session, p. 1.

The appellant never attacked the constitutional validity of Section 8-28 of the Connecticut General Statutes. Instead, he argued that its notice and time limit provisions should not be applied to his case because he requested personal notice of the Commission's decision. Appellant's July 15, 1982 brief to the Appellate Session, Conclusion, p. 9. The applicability of a statute and the constitutional validity of a statute are two separate issues. The first necessitates statutory interpretation and application. The second necessitates constitutional analysis. In *Commercial Bank of Cincinnati v. Buckingham's Executor's*, 5 How. 317 (1847), this Court found that the question decided by the state court was one of the construction of the statute and not of its validity. The Court therefore dismissed the case for lack of jurisdiction. In the case at hand, the Appellate Session construed Section 8-28, found that the statute was applicable to the appellant and therefore upheld the trial court's decision:

> Publication of the commission's decision on December 18, 1981, initiated the fifteen day appeal period; the plaintiff failed to file his appeal within that time. Statutory provisions limiting the time within which to take an administrative appeal are mandatory and, if not complied with, render an appeal subject to dismissal.
>
> *Fleischmann v. Wethersfield Planning and Zoning Commission, supra*, at 593.

The Appellate Session itself did not interpret the appellant's argument as raising into issue the constitutional validity of Section 8-28. The Court interpreted the appellant's issue as follows:

> The plaintiff does not claim that the statute in authorizing notice by publication, is constitutionally defective on its face . . . Rather, the plaintiff contends that due process mandates personal notice in his case because of his specific request for notification.
>
> *Id.* at 591.

Since the appellant did not question the validity of Section 8-28, the Appellate Session never had reason to nor did it render a decision in favor of the Statute's constitutionality. Rather, the Appellate Session rested its decision on the fact that the appellant's appeal was not timely filed in compliance with the statute. "Statutory provisions limiting the time within which to take an administrative appeal are mandatory and, if not complied with, render an appeal subject to dismissal." *Id.* at 593.

Since the appellant never drew into "question the validity of a statute of any state on the grounds of its being repugnant to the Constitution . . . of the United States," 12 U.S.C. §1257(2), and the Appellate Session never rendered a decision "in favor of its validity," 12 U.S.C. §1257(2), the United States Supreme Court cannot assert jurisdiction under §1257(2). The appellant's appeal must be dismissed. The appellant based appellate jurisdiction solely upon §1257(2) and jurisdiction in this case cannot lie under this section.

A writ of certiorari should also be denied for similar reasons. The appellant asserted only one ground, 28 U.S.C. §1257(3), for certiorari jurisdiction. However, §1257(3) confers jurisdiction if, "the validity of a State Statute is drawn in question on the ground of its being repugnant to the

Constitution . . . of the United States." 12 U.S.C. §1257(3). As established above, the appellant never drew into question the constitutional validity of any Connecticut statute. Thus, certiorari jurisdiction cannot be established on this basis, and the writ should therefore be dismissed.

II. If the Supreme Court does determine that it has jurisdiction under 12 U.S.C. §1257(2) or (3), this Court should still dismiss the appellant's appeal and writ of certiorari because the Connecticut Appellate Session's judgment rests upon an adequate non-federal basis.

Rule 16b of the United States Supreme Court Rules states that, "The Court will receive a motion to dismiss an appeal from a state court on the ground that . . . the judgment rests upon an adequate non-federal basis."

A judgment which rests upon sufficient, independent state grounds rests upon an adequate non-federal basis. In *Herb v. Pitcairn*, 324 U.S. 117 (1944), this Court stated the following:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.
>
> 324 U.S. at 117.

Similarly, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1976), this Court stated that, "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed. . . ." 433 U.S. at 566.

This Court has held that an adequate and independent state ground for a state court's judgment is a state statute of limitations. Noncompliance with a state statute of

limitations is a sufficient and independent state ground which bars further review in the United States Supreme Court. See *Rodgers v. Jones*, 214 U.S. 196 (1908); *Elder v. Wood*, 208 U.S. 226 (1907); *Seneca Nation v. Christy*, 162 U.S. 283 (1895).

In *Seneca Nation v. Christy*, this Court held the following:

> The proper construction of this enabling act, and the time within which an action might be brought and maintained thereunder, it was the province of the state courts to determine . . . As it appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any Federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rule on that subject and cannot be maintained.
>
> 162 U.S. at 289-290.

The appellant's claim that federal due process mandates personal notice in his case because of his specific request for notification of the Commission's decision is the basis upon which the appellant alleges that this Court has jurisdiction over the case because the claim brings into issue the Due Process Clause of the Fourteenth Amendment of the United States Constitution. However, the Appellate Session of the Connecticut Superior Court rested its decision upon adequate, independent state grounds. The Appellate Session decided that Section 8-28 applied to the case. Section 8-28 is a state statute of limitations mandating the time limits under which certain persons are allowed to appeal the decisions of a planning commission. Since the appellant did not file his appeal within the statutory period allowed, his appeal was therefore barred.

Application of Section 8-28 to the appellant's case, thus barring his appeal because it was untimely filed is a substantial and sufficient state ground for determination of the case. The privilege to appeal from the decision of Connecticut administrative agencies such as planning and zoning commissions exists only under statutory authority. *Royce v. Freedom of Information Commission,* 177 Conn. 584, 587, 418 A.2d 939 (1979); *Tazza v. Planning & Zoning Commission,* 164 Conn. 187, 190, 319 A.2d 393 (1972). There is no inherent or constitutional right to appeal, and a statutory right to appeal may be taken advantage of only by strict compliance with the provisions by which it is created. *Schwartz v. Town Planning and Zoning Commission,* 168 Conn. 20, 24, 357 A.2d 495 (1975); *In Re Nunez,* 165 Conn. 435, 441, 334 A.2d 898 (1973); Maltbie, Connecticut Appellate Procedure, Section 1; 4 Am. Jur. 2d, Appeal and Error, Sec. 4.

Provisions in statutes fixing the time to take an appeal are designed, in the public interest, to secure a speedy determination of the issues involved. *Fidelity Trust Company v. Lamb,* 164 Conn. 126, 132, 318 A.2d 109 (1972). Such time constraints are more than mere procedural considerations; they constitute an essential part of the remedy. *Norwich Land Company v. Public Utilities Commission,* 170 Conn. 1, 6, 363 A.2d 1386 (1975). Consequently, the limitations provisions associated with administrative appeal statutes are mandatory. A party's failure to comply with them will subject his appeal to summary dismissal. *Daly v. Board of Police Commissioners,* 133 Conn. 716, 719, 54 A.2d 501 (1947).

Section 8-28 of the Connecticut General Statutes governed the appellate's appeal to the Connecticut trial court in the instant matter. That section provides "aggrieved persons" the right to appeal designated zoning decisions. Section 8-28, however, states that any such appeal must be brought within fifteen (15) days after notice of the challenged decision is published in a local newspaper of

substantial circulation in the municipality. The statute does not require that personal notice of Commission actions be given to abutters or to non-resident land owners who request it.

In the instant case, the Commission published a notice of its approval of the Jordan Lane application in the December 18, 1981 edition of the New Britain Herald. Section 8-28, therefore, compelled the appellant to commence his appeal on or before January 2, 1982. He failed to do so.

The appellant has never contended that he filed his appeal on time and in accordance with the statute. Nor has he averred that Section 8-28 is, on its face, unconstitutional. Instead, the appellant only claimed to the Connecticut courts that due process mandates personal notice in his case because of his specific request for such notice. The Appellate Session of the Connecticut Superior Court struck down the appellant's contention because "There is no constitutional right to judicial review of the actions of a planning or zoning agency." *Fleischmann v. Wethersfield Planning and Zoning Commission, supra,* at 591.

The Appellate Session's determination of the due process claim was not necessary to its ultimate holding in the case. The court only dealt with the issue because the appellant had raised it. The real basis for the court's holding that the trial court had made no error in dismissing the appellant's appeal was the applicable state statute of limitations, Section 8-28 of the Connecticut General Statutes which mandates the dismissal of the appellant's appeal because it was not filed within the fifteen (15) day period commencing upon the publication of the Commission's decision in a local newspaper of substantial circulation.

The substantial Connecticut case law supports the finding that statutory limitations to a person's right to appeal state administrative decisions are independent, sufficient state grounds for dismissing an administrative appeal. Thus, the Appellate Session's application of Section

8-28 to the case at hand is an adequate, independent state ground for affirming the trial court's dismissal of the case. Since this state ground exists and is indeed the primary reason for the case's dismissal, this Court should likewise dismiss the appellant's appeal and writ of certiorari or, in the alternative, affirm the Appellate Session's decision.

III. The appellant's appeal and writ should also be dismissed on the grounds that the appellant failed to present a substantial federal question.

In *Deming v. Carlisle Packing Co.*, 226 U.S. 102 (1912), this Court stated that:

> In view ... of the well settled and indeed now elementary doctrine that although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal question is of such an unsubstantial character as to cause it to be devoid of all merit and therefore frivolous we think it is our duty to grant a motion to dismiss. ...
>
> 226 U.S. at 105.

Such is the case at hand. The Appellant's claim that due process mandates that personal notice govern his case because he requested personal notice of the Commission's decision is a claim devoid of all merit and frivolous. "There is no constitutional right to judicial review of the actions of a planning or zoning agency. Such review exists only under statutory authority." *Schwartz v. Town Planning & Zoning Commission, supra,* at 24-25.

The appellant's due process claim is neither strengthened nor supported by the cases which he cites and discusses in his jurisdictional statement. Throughout the proceedings in this case, he has cited no cases other than *Mullane v. Central Hanover Bank & Trust Company,*

339 U.S. 306 (1950), and some of its progeny. The holding of each cited case is inapposite to the issue presented by this appeal.

Each of the cited decisions discusses the notice due a property owner of the *pendency* of a judicial or administrative proceeding to be held regarding his property or legal entitlement. Each of the cases considers the adequacy of a particular *pre-hearing* notice as an element of due process and as a guarantee of a meaningful opportunity for the property owner to be heard in the first instance. However, none of the cited cases considered, much less decided, the question of whether due process compels an administrative body to provide personal notice of its post-hearing decisions to every person who requests such notice.

In particular, the appellant's reliance on the case of *Schroeder v. City of New York*, 371 U.S. 208 (1962) is misguided. Contrary to the appellant's oft-repeated claim, the instant matter is not "very similar on its facts" to the *Schroeder* case.

Schroeder involved a challenge to the adequacy of the pre-taking notice provisions of New York City's condemnation rules. The instant case involves a person who attended and participated in a zoning hearing, the results of which he now seeks to contest. By way of contrast, Mrs. Schroeder received no notice of the pendency of the condemnation proceedings until long after the fact.

In the case of *Edward Balf Company v. Town of East Granby*, 152 Conn. 319, 324, 207 A.2d 58, 61 (1965), a party challenging the enactment of zoning regulations raised a *Schroeder* due process claim very much like the one made by the appellant herein. Balf admitted that the contested regulation had been adopted in accordance with the pre-hearing notice provisions of the applicable statute. *Id.* Balf claimed, however, that under *Schroeder*, since its name and

interest were known to the Town, the Town should have given it personal pre-hearing notice of the proposed regulations. The court, recognizing that due process is a fluid concept, distinguished the *Schroeder* case on its facts and rejected this argument out-of-hand. *Id.*

Similarly, in its December 24, 1982 Memorandum of Decision, the Appellate Session acknowledged that due process is a flexible notion, and wrote that, "there is no hard and fast rule defining what constitutes proper notice; rather 'due process requires that the procedure involved must be appropriate to the case.'" *Fleischmann v. Wethersfield Planning and Zoning Commission, supra,* at 591, quoting *Shea v. State Employees' Retirement Commission,* 170 Conn. 610, 616, 368 A.2d 159 (1976). Acting on this principle, the Appellate panel proceeded to hold, "Given the need to alert a potentially large number of people whenever a zoning commission renders a decision, notice by publication complies with the constitutional requirement of due process . . ." *Fleischmann v. Wethersfield Planning and Zoning Commission, supra,* at 592.

This holding is well-grounded in precedent. It has long been established that, absent a contrary statutory directive, personal notice of a zoning authority's decision is not necessary to trigger the running of the appeal period. Constructive notice, in a form designated by the enabling act, is sufficient. Rathkopf, *The Law of Zoning and Planning,* 4th Ed., Sec. 42.04(4), and cases cited therein; *Kron v. Thelen,* 177 Conn. 369, 372, 423 A.2d 857 (1979); *Jarvis Acres, Inc. v. Zoning Commission,* 163 Conn. 41, 47, 301 A.2d 244 (1977), cited by the Appellate Session at page 592; see also *Alper v. Nowakowski,* 397 N.Y.S. 2d 42, 58 A.D. 2d 1012 (1977); in which parties who appeared and testified at a zoning board hearing claimed a denial of due process when they were given only the statutorily-mandated constructive notice of the board's decision. The court upheld the board, relying on the presumption favoring the constitutional validity of legislative enactments,

which "can be overcome only by the most cogent and compelling reasons." Section 8-28 of the Connecticut General Statutes as noted, requires only constructive notice.

The appellant's due process argument simply ignores a crucial distinction between the notions of the type of notice due an effected person of the pendency of a legal or quasi-legal action, and the type of notice due a person of the resolution of that action. The Supreme Court of Errors recognized that distinction when it wrote:

> A limitation on the right of appeal must be distinguished from the right to bring a common law action, where no statute is involved creating that right.

Norwich Land Company v. Public Utilities Commission, 170 Conn. 1, 7, 363 A.2d 1386 (1975); see also *Tazza v. Planning & Zoning Commission,* 164 Conn. 187, 191, 319 A.2d 393 (1972), in which the court held that Section 8-28 does not grant abutters the right to notice of a pending appeal brought by an unsuccessful applicant.

A Missouri case, *Cohen v. Ennis,* 318 S.W. 2d. 310 (Mo. 1958), provides a useful insight into the issues involved in the instant matter. In *Cohen,* the owner of property abutting land regarding which a variance had been granted filed an appeal. Unfortunately, the appeal was filed late. However, Cohen claimed that the attorney representing the zoning board had promised to give him personal notice of the board's action on the variance application but failed to do so. Said failure, Cohen argued, deprived him of due process and tolled the limitations period. 318 S.W. 2d. at 314.

The Missouri Supreme Court rejected Cohen's argument and dismissed his appeal. The applicable statute required Cohen to commence his appeal within thirty (30) days of the filing of the zoning board's decision. The court

held the limitations period to be "mandatory and jurisdictional." *Ibid.* Moreover, regarding the alleged agreement to provide Cohen personal notice, the court said,

> (A)n extra-judicial statement ... concerning notice to the parties, if made, could neither modify the status nor invalidate a lawfully made order of the board. And surely, it would not bind or prejudice Continential (the applicant for a variance) in any right vested in it under the order here involved.

Id. at 315; see also, *Lanning Appeal*, 6 Pa. D & C 3d. 345, 349 (1978), where, in a case similar to *Cohen*, the court stated that an individual representative of a zoning authority possesses no power to extend or waive statutory provisions.

The appellant in the instant matter presents an even less compelling case than did Cohen. There exists no evidence that either the Commission or any of its agents even remotely manifested an intention to personally notify the plaintiff of its impending decision on the Jordan Lane application.

Finally, the appellant presents the contention that the Appellate Session's Memorandum of Decision is inadequate and that he is therefore entitled to further judicial review. The appellant seems to state that, because the memorandum does not discuss by name the cases he cited, it somehow failed to consider his argument.

The contention is simply factually wrong. The court expressly considered and rejected the appellant's due process claim. *Fleischmann v. Wethersfield Planning & Zoning Commission, supra*, at 591-593. While it did not recite the cases cited by the appellant, the court clearly weighed them in its decision, and concluded that they were not relevant to or determinative of the issues presented. The court

provided ample Connecticut authority for its decision, and adequately appraised the parties of the basis of its holding.

In summation, the appellant has presented an issue completely unsupported by case law. His argument also fails to present any logical reasons for creating new inroads into the federal constitutional concept of due process. Thus, the appellant has failed to present a substantial federal question worthy of the Court's consideration. This Court should therefore dismiss the appellant's appeal and writ or, in the alternative, affirm the Connecticut Court's decision on this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Dismiss or Affirm has this 6th day of May, 1983 been served upon Fleischmann, Sherbacow & McWeeny, 60 Washington Street, Hartford, CT 06106 and Kotchen, Ripper and Goldstein, 2264 Silas Deane Highway, Rocky Hill, CT 06067 by U.S. Mail, First Class Postage Prepaid. The foregoing constitutes service upon all parties and persons required to be served under United States Supreme Court Rule 28.

/s/ Vincent Sabatini
Vincent Sabatini
Member of the Bar of
the United States
Supreme Court